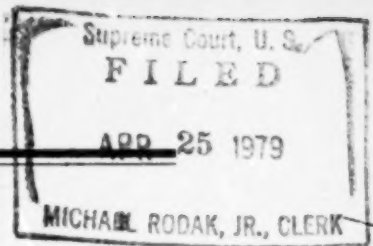


78-1628
No.



**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

HOMER HANRAHAN AND MICHAEL HANRAHAN,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FIRST JUDICIAL DISTRICT**

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Petitioners Homer Hanrahan and Michael Hanrahan, pray that a Writ of Certiorari be issued to review the judgment of the Illinois Appellate Court for the First Judicial District entered in this cause on September 11, 1978.

OPINIONS BELOW

The opinion of the Illinois Appellate Court for the First Judicial District is reprinted as Appendix A, *infra*. The Supreme Court of Illinois issued no opinion.

JURISDICTION

The opinion of the Illinois Appellate Court was entered on September 11, 1978. A timely Petition for Leave to Appeal to the Supreme Court of Illinois was filed by the Petitioner, but such Petition was denied on January 25, 1979. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257 (3); 62 Stat. 929.

QUESTIONS PRESENTED

1. May the State inform a defendant that he is being questioned as part of an investigation of a battery without telling him he is being placed under arrest or is being charged with a crime and use statements elicited under these pretenses at his trial for murder and kidnapping?
2. May the court deny a Motion for Severance when the statement of one co-defendant is used against the other co-defendant?
3. Did the court err when it allowed the prosecutor who was a witness to the defendants' statements and who testified at the Motion to Suppress to act as the prosecutor at trial, thereby foreclosing his availability as a witness to the defense?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

STATUTORY PROVISION INVOLVED

Illinois Revised Statutes, 1975, Chapter 38, §114-8

If it appears that a defendant or the State is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require.

STATEMENT

At the hearing on preliminary motions, the following facts were presented. At approximately midnight on November 22, 1974, Mary Ellen Hanrahan, age 16, went to the Niles, Illinois Police Department to report her worry about her mother, Marian Hanrahan. (T. 7) She told Police Officer Thomas E. Ferraro that late on November 20, 1974 she heard her mother, father and older brother in "a terrible fight, argument." (T. 241) At one point she saw blood on her brother's arm, at another point she heard her mother moaning and crying out that something was hurting her. She later fell asleep and she did not see her mother the next day, November 21, 1974. (T. 242)

Mary Ellen Hanrahan then had a conversation with Captain Ed Dennis, Detective Sergeant Giovannelli, Officers Tom Ferraro, Vito Lo Verde and Gerald Sheehan. (T. 8)

She related to them that on November 20, 1974, she heard, through a heating vent, her mother moan. She then went downstairs and was met by her father Homer who did not live with the family. Homer told her everything was okay and that she should go upstairs. (T. 9) She then said that her Uncle Gerry Wallenberg and her brother Steve came to the house and that she had a conversation with them and her older brother Michael, age 19. (T. 10) Michael told her later that their mother had gone crazy and had come at Michael with a knife. He said he had hit her in the face. Michael told Mary Ellen that she could not see her mother because her parents were talking things over in the basement. (T. 10) She then said that the following morning, November 21st, her father told her that her mother was asleep and that she was fine. Mary Ellen did not see her mother that morning. (T. 11)

That afternoon when she returned from school at about 2:15 P.M., she found a note on the kitchen table in her father's handwriting. It stated that her mother and father had taken a short trip and would be back Friday. She then went to her part-time job. (T. 11-12)

Later on November 21, 1974 Steven received a phone call from his father Homer saying everything was okay. Steven asked to talk to his mother, but Homer told him she was taking a bath. (T. 12)

After Mary Ellen discussed the above facts with her Uncle Gerry Wallenberg she went to the police. (T. 12) Following the conversation with Mary Ellen, police officers went to the family home at 8633 Normal Avenue, Niles, Illinois, where they noticed a smear of blood on a post and its base in the basement. They noticed also blood droplets on the stairs. (T. 14) The officers conducted no scientific test to determine if in fact the substance they noticed was

blood. (T. 166) In the upstairs bedroom of Homer and Marian Hanrahan the police noted that the bed had only pillows and a stained mattress cover. A search of the house did not produce any bed linen. (T. 15) While the police were at the house, Steven informed them that his mother never left without saying goodbye to him. (T. 16)

Through an earlier phone call to Steven from Homer the police were able to determine that Homer had been at the Clayton House in Love Park, Illinois. (T. 16) At approximately 3:00 A.M. on November 22, 1974, the Love Park Police discovered that Homer had been registered at the Clayton House, but had left before they arrived there. (T. 17)

Captain Dennis testified that he had instructed the officers to arrest Michael for the investigation of the missing person (Marian) as well as for the assault. (T. 253-254) At approximately 6:00 A.M. on November 22, 1974, Niles Police Officers Giovannelli, Lo Verde and Sheehan went to the Sigma Phi Fraternity House at the Chicago Technical College at 5907 Midway, Chicago, Illinois and took Michael Hanrahan into custody. (T. 19) The three officers testified that they arrested Michael for battery. (T. 19, 115, 147)

In relating the events of November 22nd, Michael Hanrahan testified that he was living in a fraternity house and that at 6:00 A.M., a fraternity brother, Bill Sisk, woke him to say that there were three police officers to see him. (T. 410-412) Michael stated that the officers told him they were taking him to the police station for an investigation. (T. 412) Bill Sisk also testified that the officers told him they were taking Michael to the police station for questioning only. (T. 312)

Michael testified that he was handcuffed and taken to the Niles Police Station. (T. 413) At approximately

7:00 A.M., Officers Giovannelli, Lo Verde and Ferraro started questioning him about where his mother was. Ferraro whispered that Michael better cooperate with the police if he knew what was good for him. (T. 413) This questioning lasted forty-five minutes. Michael signed a waiver of rights form, though he testified he did not understand Number 5: "If you answer questions or make any statements without consulting a lawyer, or without having a lawyer present during the questioning you will still have an absolute right to stop answering questions or making any statements until you consult a lawyer, or have a lawyer present during the questioning." (T. 416) At the end of this questioning Michael Hanrahan indicated he wished to remain silent. (T. 418)

Michael further testified that Officer Lo Verde then asked him what he had to hide if he remained silent. The officer also told him that Mr. Giovannelli was an ex-golden gloves boxer and told him that if he did not start cooperating with the police he would be "worked over". (T. 419)

At approximately 8:30 A.M., Officer Giovannelli informed Michael of his rights again and then questioned him for about an hour. (T. 118) At approximately 10:00 A.M., Assistant State's Attorney Paul Lazarus advised Michael of his rights and questioned him for approximately half an hour. (T. 421, 318) At approximately 11:00 A.M., Mr. Lazarus informed Michael again of his rights and took a statement from him lasting half an hour. (T. 320) At approximately noon, Assistant State's Attorney Carl Piazza talked with Michael. (T. 386)

Around noon Homer phoned Michael at the station, but he did not know he was calling a police station. (T. 423) Michael testified that Officer Giovannelli said "kid, you have no choice" but to talk to your father and help the

police. (T. 423) Shortly after this incident Michael was placed in a car driven by a police officer and taken to meet his father. (T. 118-119) Michael testified that he had been threatened by the police officers at this point. (T. 423-424) However, the officers denied that any threats were made. (T. 121)

Homer did not meet Michael as planned. (T. 425) Michael was returned to the station. Thereafter, about 3:00 P.M. Mr. Piazza, Mr. Lazarus and Officer Sheehan took a statement from Michael with a court reporter present. (T. 321)

Michael testified that from the time of his arrest until 7:00 P.M. he had had no food or rest. (T. 427) Mr. Piazza remembered Michael having a hamburger at about 6:00 P.M. (T. 398)

Mr. George Pappas, the courtroom prosecutor in this case, testified that he arrived at the Niles Police Station between 7:00 and 7:30 P.M. (T. 268) At about 9:00 P.M. Mr. Pappas and Mr. Lazarus talked to Michael. (T. 272) Mr. Pappas informed Michael of his rights and then questioned Michael. Mr. Lazarus did not stay in the room for the questioning. (T. 273-274)

Michael testified that Mr. Pappas identified himself as a defense attorney there to assist Michael. (T. 428) He further stated that Mr. Pappas did not give him his rights. (T. 428) Mr. Pappas denied this. (T. 272-273)

Michael further stated that, at about 12:30 A.M. on November 23, 1974, Mr. Pappas introduced him to a Mr. Gino Di Vito, and told him he was the lawyer who would represent Homer. (T. 429-430) In fact, Mr. Di Vito was also an Assistant State's Attorney. Mr. Di Vito then took a statement from Michael.

Based upon the questioning of Michael, at approximately 7:00 P.M. Homer was arrested at 1468 Rosita Drive. (T. 478-482) He was brought to the Niles Police Station.

Mr. Di Vito testified that at 2:00 A.M. on November 23, 1974, he had a conversation with Homer Hanrahan with Mr. Pappas present at which time Homer was advised of his rights. (T. 357) Homer testified that Mr. Di Vito had told him he was a defense attorney and that he talked to him only because of that representation. (T. 497-501) Mr. Di Vito advised him to sign consent to search forms. (T. 497) Mr. Di Vito denied these facts. (T. 357)

Prior to trial motions were filed to quash the arrest of both Michael and Homer, to suppress all statements of Michael and Homer, and to sever the cases for trial. (T. 51, 52, 59, 61, 65) The Court denied the Motion to Quash the Arrest of both and denied the Motion to Suppress all statements. (T. 628-632) The Court then denied the Motion for Severance after the Assistant State's Attorney Pappas indicated that Michael's statements would be excised. (T. 637-648)

The Court further denied a Motion for Mr. Pappas to be removed as courtroom prosecutor although the defendant argued that he would be denied his right to confront a witness. (T. 671)

At trial the state presented Mary Ellen Hanrahan, Steve Hanrahan and Gerry Wallenberg to testify about their observations recorded above.

In addition, Officer Giovannelli testified that Michael told him at 7:00 A.M. on November 22, 1974 that he had seen his mother and father leave the Niles home at noon on November 21, 1974. (T. 220) However, Mr. Di Vito testified that Michael told him at 12:30 A.M. on November

23, 1974 his previous statements were not true. (T. 754) Michael told Mr. Di Vito that he and Homer met in Jake's Restaurant in Niles, Illinois. The meeting was scheduled for seven-thirty on November 20, 1974. Homer arrived at seven-forty-five. There, he and his father discussed what they were going to do with his mother later that day. Specifically, they discussed keeping his mother a prisoner until such time as she consented to sign over to himself, his sister and brother by way of some sort of trust deed, her home in Niles. Michael said that the home had a mortgage of approximately three thousand dollars and a market value of seventy or eighty thousand. There was also some undeveloped property in Lake Summerset.

Michael further stated to Mr. Di Vito that he and his father left Jake's at approximately eight-fifteen. In the parking lot, his father gave him an unloaded, automatic handgun. They drove, in their own cars, to a Foremost Liquor Store, where his father went in to purchase a six pack of beer.

As his father went into the liquor store, Michael left and drove home. He arrived at the same time his mother pulled into the driveway, approximately eight-thirty. He and his mother entered the house together. After a short period of time, his father arrived. He let his father into the house. No-one else was home at this time. (T. 755)

Mr. Di Vito further testified that Michael stated that he, Marian and Homer went into the basement. Michael said he pulled the unloaded automatic weapon, pointed it at his mother and made the demand he and his father had talked about previously. At this time, to Mr. Di Vito's recollection, Michael stated that his father endeavored to bind his mother. She struggled, and to use Michael's exact words, "kicked him in the nuts".

His mother fell to the ground, unconscious. According to Michael there was severe bleeding. He and his father used bath towels to wipe up the blood which was on the basement floor as well as on his mother.

From time to time when she would regain consciousness, he said his father administered to her chloroform, which was dipped in rags. He said a slit was cut in the rear of her slacks so as to cause a panel opening. Through this slit, drugs, which he could not identify, were injected into her buttock. (T. 756) His father bound his mother's hands and feet with rope which his father had brought with him.

Michael said that during the time he, his mother and his father were in the basement, his sister returned home. She was sent to bed by his father. Shortly thereafter his twelve year old brother returned home. He was also sent to bed by his father.

Michael said that during the period of time they were in the basement both he and his father had blood on their clothing. All of their clothing except undershorts was removed and washed by the father in the washing machine. After the clothing was dried they put it back on. (T. 757)

At some time later in the early morning his mother was carried upstairs to her bedroom. Michael said that he carried her feet while his father carried the upper part of her body. She was laid in her bed at that time. Michael said he slept on a couch in the living room that evening.

The next time he saw his mother was at six-thirty, the morning of the 21st of November. He went up to his mother's room. His mother had an ace bandage on her head. His father assured him that his mother was okay, that he would take care of everything.

Michael said that before leaving for school, at his father's request, he removed his Vega from the driveway and pulled his father's Nova into the attached garage. He then drove his own car to school. He worked in the canteen at school from eight to approximately ten o'clock A.M. Sometime between ten-thirty and eleven, he returned to his mother's home. (T. 758)

When he returned home, his father and he carried his mother from the bedroom. At that time, his mother was wrapped in sheets and blankets from the bed. His mother was placed in the trunk of his father's Nova which was in the attached garage.

Michael said that as they entered the garage, he heard what he thought was a groan from his mother. He said he also noted that his mother was totally naked at that time but her hands were tied behind her back and her feet were tied. He said that he surmised that his father had untied his mother, disrobed her and retied her. (T. 759)

Some towels used in the cleaning process were placed in the trunk. Michael said that his father also took a spade from the garage and placed it in the car. He also stated that his father said something about burying his mother in the "boonies" or out in the country somewhere near the Lake Summerset property. The unloaded automatic handgun which Michael had used the night before was placed in the automobile. Another gun, which he had seen in a holster sitting on a bar in the basement, was placed in the glove compartment of his father's car. Some empty beer cans from the night before and the blankets and sheets in which the mother was wrapped were also placed in the car. The hypodermic needles and drugs were also placed in the car. (T. 760)

Michael then said that he left the home in his own car for a job interview at the Veteran's Administration Hospital. After the interview was over, upon his return to his car, he discovered that it was stolen.

Michael said that sometime after the interview he was contacted by the police regarding his mother's whereabouts and at that time he gave them the false story which he had referred to earlier. Michael also said that before leaving the house, his father had left a note for his brother and his sister explaining the whereabouts of his mother.

Michael further told Mr. Di Vito that after being contacted by the police, he telephoned his father and explained to him that his car had been stolen. His father suggested that he meet his girlfriend, Roberta Stiles, at a designated location. Michael went to that location in a taxicab driven by a Niles police officer posing as a cab driver. He said that Roberta did not meet him at the designated place and he returned to the Niles Police Department. (T. 764)

Mr. Di Vito then testified that at 2:00 A.M. on November 23, 1974, Homer told him and Mr. Pappas that the two guns were in a dresser drawer at his friend, Roberta Stile's home. He said that the towels and blankets which had been bloodstained were in a cardboard box in the basement of his girlfriend's house. He had laundered them at her house without her knowledge. (T. 768)

Homer said that he had placed the ace bandage in a garbage can in his girlfriend's garage. He said that his wife's clothing, including her slacks with the panel cut, her bra, sweater, blouse and underpants were all placed in a garbage can outside his Mount Prospect apartment. (T. 768)

Homer said all the drugs which were used were placed in the same garbage can. He identified the drug that was injected into his wife as sparine. He described it as a heavy sedative type drug. He identified chloroform as another substance used. He further told Mr. Di Vito that he was familiar with drugs as a result of his former employment with a drug company. (T. 769)

Homer Hanrahan also told Mr. Di Vito that his son had struck his wife on the head with a gun. This occurred shortly after she displayed or wielded a serrated knife. The only additional thing which he said, after saying something about wanting to talk to an attorney, was that his wife had struck Steven on the head with a plastic dish and had caused such injury to his head that it required stitches. (T. 771) At this point, Mr. Di Vito concluded taking the statement.

Dr. Choi testified that the cause of death of Marian Hanrahan was morphine intoxication, associated with the use of chloroform, phenothiazine and multiple bruises. (T. 545)

Dr. Christopoulos testified that People's Exhibit 30(b), phenegan with codeine, a cough remedy would break down to morphine after ingestion. (T. 687) But he could not say if the 412 milligrams of morphine in the bile came from People's Exhibit 30(b). (T. 699) He further stated that it would take five bottles of the cough remedy to reach the morphine level found. (T. 688)

Homer Hanrahan testified in his defense and denied giving morphine in any form to his wife. (T. 1067) He also admitted giving his wife sparine in an attempt to quiet her down. (T. 1037)

The jury found Homer guilty of murder, aggravated kidnapping, conspiracy and aggravated battery. The jury found Michael not guilty of murder, but guilty of aggravated kidnapping, conspiracy and aggravated battery. (T. 1741)

Motions for new trials for both Homer and Michael were denied. (T. 1756, 1791)

Homer was sentenced to 50-100 years for murder, 3-10 years for aggravated battery and 20-40 years for aggravated kidnapping. Michael was sentenced to 10-25 years for aggravated kidnapping and 3-10 years for aggravated battery. (T. 1862-1863)

REASONS FOR GRANTING THE WRIT

I.

THE COURT ERRED IN FAILING TO GRANT HOMER HANRAHAN AND MICHAEL HANRAHAN'S MOTIONS TO QUASH ARREST AND SUPPRESS STATEMENTS TAKEN IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT.

The facts of this case indicate that defendant, Michael Hanrahan, was awakened at six o'clock in the morning by members of the Niles Police Department who informed him they were conducting an investigation of a battery. Instead of seeking his cooperation, however, the petitioner, an 18 year old youth, was placed under arrest without benefit of a warrant issued by a judge, handcuffed, and whisked from his home to the police station under the guise that his cooperation was needed for a police investigation of a battery incident. (T. 312, 412)

The above facts amply indicate that the defendant did not consent to the initial police actions. Rather, he was deceived into believing that the police were merely investigating a possible crime and therefore wanted to question him. In fact, the police took the steps to arrest him without probable cause. As such, no consent to the arrest can be imputed to the defendant. It is also doubtful whether a citizen could effectively consent to waive his privilege against self-incrimination when the intent of the police was not explained to him.¹ This is not unlike the situa-

¹ See e.g. *Oregon v. Mathiason*, 429 U.S. 492 (1977) (defendant consented to the investigation by voluntarily visiting the police station).

tion in *Brown v. Illinois*, 422 U.S. 590 (1975) in which the police officers "acknowledged in their testimony that the purpose of their action was, 'for investigation' or 'for questioning' ". *Id.* at 605.

At seven o'clock in the morning, the interrogation began. The police advised the defendant of his rights under *Miranda* and he signed a waiver of rights. At that point he gave a statement. After one and one half hours of interrogation, the defendant gave a second statement. (T. 118) A third statement was taken one and one half hours later. (T. 421) A fifth was taken an hour after the fourth. (T. 386) A sixth statement was taken three hours later. (T. 321) Five hours later, the defendant gave his seventh statement (T. 273-274) and three and one half hours later, an eighth was taken. (T. 429-430) In seventeen and one half hours, eight statements were taken, an average of one statement every two hours. Twenty-two hours after the police first called upon the defendant at his fraternity house, he was brought before a magistrate.

The scenario, in its totality, is similar to that in *Brown*. Furthermore, in the instant case the defendant was not told that he was under arrest nor that he was being charged with any crime. He was interrogated for a more extended period of time than the defendant in *Brown*. Accordingly, the policies and practices as enunciated in *Brown* clearly indicate that the defendant Hanrahan's statements, taken in violation of the Fourth Amendment, must be excluded.

In both *Brown* and the present case, the "arrest" was not an arrest, but an investigation. In neither situation was there probable cause. Hence, both the *Brown* and Hanrahan "arrests" were illegal. More so, the Hanrahan "arrest" was performed in a deceitful manner and was intended to lull the defendant into believing that a mere

investigation was taking place; thus the police hoped to circumvent the constitutional underpinnings of a warrantless arrest while treating the defendant as if he were arrested. As so aptly noted in *Brown*,

Arrests made . . . for questioning or "investigation" would be encouraged by the knowledge that the evidence derived therefrom could well be made admissible by the simple expedient of giving *Miranda* warnings.

422 U.S. at 602. This is certainly what the officers had in mind when they told the defendant an investigation was being pursued, read him the *Miranda* warnings and interrogated him for seventeen and one half hours—they hoped to negate any taint resulting from the primary illegality and deception by repeatedly giving the *Miranda* warnings.

The above facts demonstrate that the cornerstone upon which *Brown* was premised is present. Additionally, the mandate of *Wong Sun v. United States*, 371 U.S. 471 (1963) and *Brown* bespeaks of the necessity to overturn the trial court. As stated in *Brown*,

Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint'.

422 U.S. 602, citing *Wong Sun*, 371 U.S. at 486. Furthermore,

the *Miranda* warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.

422 U.S. at 603.

Although the *Brown* court recognized the significance of the *Miranda* warnings, *Id.*, it also noted several other factors bearing on the determination of whether or not the

confession was product of free will. It suggested considering the temporal proximity between the primary illegality and the confession. *Id.* As mentioned previously, one statement was taken immediately, one approximately an hour later, then six more over the next fifteen hours.

The Court also noted the relevance of the presence of intervening circumstances. *Id.* In the present case, the only intervening circumstances were the incessant interrogations of a young man by police and prosecutors. There clearly was no "intervening act of free will". See, *Wong Sun*, 371 U.S. at 486. Rather, the intervening acts only exacerbated the import of the primary illegality.

Lastly, the *Brown* court suggested that the purpose and flagrancy of the official misconduct would be relevant. 422 U.S. 604. The purpose of the official conduct in the instant case was "to investigate". However, the legal conduct became illegal once the officers stated and reported in writing they were investigating, but nevertheless acted in such a manner to effectuate an arrest. The flagrancy of the misconduct arises from the deceitful manner in which the officers approached the defendant. Moreover, they admittedly were on an "expedition for evidence in the hope that something might turn up". *Id.* at 605.

There is no question that the officers in this case violated defendant Michael Hanrahan's Fourth Amendment rights. This "violation" is not rectified by the repeated issuance of *Miranda* warnings which, under the circumstances, could not be said to have been knowingly waived by the arrestee. As *Brown* so clearly held, this surreptitious modus operandi will fail. Notwithstanding the flagrant misconduct of the officers, the Illinois court disregarded the teachings of the Constitution, of *Wong Sun* and of *Brown* by failing to suppress the arrests and confessions of both Michael

and Homer Hanrahan. Consequently, it refused to accord them a trial meeting the mandates of the Constitution. Accordingly, we ask that the decision of the Illinois Appellate Court be reversed.

II.

HOMER HANRAHAN'S MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED BASED UPON THE FACT THAT THE STATEMENT OF MICHAEL HANRAHAN WAS INTRODUCED INTO EVIDENCE BY THE PEOPLE.

At the time the severance issue was presented to the Court Assistant State's Attorney, George Pappas stated:

To obviate the possible *Bruton* dilemma, your Honor, we are in a position to present, or argue to the Court that when the alleged confessions of each defendant will be presented to the jury that the appropriate references to any co-defendant will be eliminated. I think it can be done quite easily, especially when we are dealing with individuals, your Honor, that are lawyers, and can be cautioned certainly well in advance, and are aware of the *Bruton* dilemma, and certainly when they testify before the jury any reference that they will make to any co-defendant will be deleted.

So I think we can obviate the *Bruton* versus *United States* dilemma that we are possibly confronted with by excising the reference of a co-defendant. That certainly satisfies *Bruton*. (T. 639)

The State also cited *People v. Clark*, 50 Ill. 2d 292, 278 NE 2d (1972) to support their position. Based on this the Court denied the severance. (T. 648)

At trial Homer's attorney attempted to have the agreed references eliminated. (T. 737) Michael's counsel ob-

jected to the excisions in that such deletions changed the knowledge and the intent of Michael's statement. (T. 738) The Court then allowed Michael's entire statement to go to the jury. (T. 738)

Prior to trial the State admitted that:

We may have a situation in this particular case, however, your Honor, where one defendant's statement, that being Michael's is somewhat more detailed than Homer's statement. So I don't know whether based on the statements that we have before the Court whether we can satisfy the recent line of cases indicating substantial similarity may permit introduction of the confession. (T. 637)

Because the excisions agreed to were barred by the objection of the co-defendant and the fact that the co-defendant's statement did deprive Homer of his right to confront witnesses the severance should have been granted. *Bruton v. United States*, 391 U.S. 123 (1968). This is especially true here where the co-defendant Michael did not testify.

Section 114-8, Chapter 38, Illinois Revised Statutes 1975, requires a severance where one defendant would be prejudiced by trial with another. Here this prejudice was agreed to by the People and the defendant Homer Hanrahan and appropriate action was to be taken. However, though there was no disagreement that one defendant's statements prejudiced the co-defendant, requiring that all references to Homer be excised, this excision was stopped by the action of the co-defendant Michael. (T. 738) Therefore, a severance should have been granted.

III.

THE COURT ERRED WHEN IT ALLOWED THE PROSECUTOR, WHO WAS A WITNESS TO THE DEFENDANTS' STATEMENTS AND WHO TESTIFIED AT THE MOTION TO SUPPRESS, TO ACT AS THE PROSECUTOR AT TRIAL AND THEREBY EFFECTIVELY FORECLOSE HIS AVAILABILITY AS A WITNESS TO THEIR DEFENSE.

Prior to opening statements defense counsels objected to Assistant State's Attorney George Pappas acting as counsel for the State in this case. The defendant requested that in the event Mr. Pappas did not voluntarily withdraw, that the Court order him to withdraw. (T. 663)

Pappas' participation in the investigation of this case was extensive. He was one of the assistant state's attorneys who gave instructions to the police officers. (T. 198) He was the only other person present during the oral statements Assistant State's Attorney Gino DiVito took from Michael (T. 751) and Homer Hanrahan. (T. 767) Pappas even testified in the defendants' motion to suppress. (T. 268-306) When the defendants' original motion to preclude Assistant State's Attorney Pappas from trying the case was made, the State's Attorneys Office assured the defendants that Mr. Pappas would not testify in their case in chief. (T. 38)

In raising this motion, the defendants' stated concern was that the State would be given the opportunity to buttress their case by Assistant State's Attorney Pappas' participation in both the investigation and trial of this case, and that, as a result, the defendants would be denied their Sixth Amendment right of confrontation by their accusers.

It is well established that the Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the States by the Fourteenth Amendment of the United States constitution, *Dutton v. Evans*, 400 U.S. 74 (1970); *Bruton v. United States*, 390 U.S. 123 (1968).

During opening statements Assistant State's Attorney Pappas put his participation in the investigation before the jury. (T. 34-37) On these statements alone, defense counsel made a motion for a mistrial which was denied. (T. 42) Although the Court admonished Assistant State's Attorney Pappas "to keep yourself out of this case" (T. 40), Mr. Pappas' participation in the investigatory stages was repeatedly put before the jury.

For example, Gino DiVito testified that when he arrived at the Niles Police Station on the evening of the 22nd of November, 1974, he encountered George Pappas and had a conversation with him. (T. 749) Earlier that day, DiVito had instructed Pappas to go to the Niles Police Station. (T. 801)

DiVito further testified that prior to speaking with Michael Hanrahan, he had received information from Assistant State's Attorney Pappas (T. 812) and that Pappas was present during the statements he took from Michael and Homer Hanrahan. (T. 751, 767) Mr. DiVito did not request the presence of a court reporter and he took no notes during these statements. (T. 814-815) Moreover, Dr. Eupil Choi testified that prior to performing an autopsy, he received a history of the case from Assistant State's Attorney Pappas. (T. 553)

The effect of these constant references to Pappas' role in the investigation was that Pappas became an unsworn or silent witness against the defendants, and thus not sub-

ject to cross-examination. Significantly, under an accused's constitutional right to a trial by an impartial jury and right to be confronted with the witnesses against him, the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. *Parker v. Gladden*, 385 U.S. 363 (1966). In this case the evidence received an implied corroboration by the fact that the prosecutor, present in the courtroom before the jury, was also present during many of the activities about which the jury heard. His presence in the courtroom was used further to buttress the truth of other witnesses through his "testimony" in opening and closing statements to the jury. The defense's inability to cross-examine Pappas denied the defendants a fair and impartial trial.

CONCLUSION

Both facets of the Appellate Court's decision in this case represent substantial and dangerous departures from guidelines that have been carefully drawn to protect vital constitutional rights by this Court. Left unreviewed, the decision of the Illinois Court undercuts these guidelines to the extent that they may well be considered meaningless in Illinois. See, *Stone v. Powell*, 428 U.S. 465 (1976). For these reasons we respectfully urge that this Court issue its Writ of Certiorari to the Appellate Court of Illinois for the First Judicial District.

Respectfully submitted,

CARL P. CLAVELLI
Attorney for Petitioners

LAWRENCE J. SUFFREDIN, JR.
on the brief

APPENDIX

APPENDIX A

FIRST DIVISION

September 11, 1978

No. 77-777

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

HOMER HANRAHAN and MICHAEL HANRAHAN,

Defendants-Appellants.

Appeal from the Circuit Court of Cook County.

Honorable ROBERT J. COLLINS, Presiding.

Mr. *Justice McGloon* delivered the opinion of the court:

Defendant Homer Hanrahan and his son, co-defendant Michael Hanrahan, were charged with conspiracy, murder, aggravated kidnapping, and aggravated battery of Marian Hanrahan, their respective wife and mother. In a joint jury trial, Homer Hanrahan was found guilty and sentenced to concurrent terms of 50 to 100 years for murder, 20 to 40 years for aggravated kidnapping, and 3 to 10 years for aggravated battery. Michael was found guilty of aggravated kidnapping and aggravated battery. He was sentenced to serve concurrent terms of 10 to 25 years for aggravated kidnapping and 3 to 10 years for aggravated battery.

On appeal, defendants argue that the trial court erred (1) in refusing to suppress certain statements made by

defendants; (2) in refusing to grant defendant Homer Hanrahan's motion for severance; (3) in refusing to give the jury an instruction on involuntary manslaughter; and (4) in denying defendants' motion to remove the prosecutor from the case since he participated in its investigation. Defendant Michael Hanrahan also argues (5) that the jury's verdict of not guilty of murder but guilty of aggravated kidnapping is legally inconsistent.

We affirm.

At approximately midnight on November 22, 1974, Mary Ellen Hanrahan, age 16, went to the Niles Police Station to express worry about her mother, Marian Hanrahan. She related that when she arrived home at 9:30 p.m. on November 20, she was met at the door by her father, defendant Homer Hanrahan. She indicated that it was unusual for him to be there since divorce proceedings were pending between him and her mother and further because he was no longer living at the home. She noticed blood on his arm and chest which he explained was the result of a fight between the deceased and her brother, defendant Michael, but that everything was now settled.

Defendant Homer instructed her to go upstairs to her room, which she did. Once there, however, she listened at an air vent that led to the basement. She stated that she heard the deceased scream and that she heard her mother moan, "It hurts, it hurts."

A short time later, Mary Ellen heard her uncle, Gerry Wallenberg, bringing her brother Steve home from a birthday party. Defendant Michael opened the door for them. Mary Ellen stated that Michael was wearing only his undershorts and that they too, had blood on them. When Mary Ellen inquired what was wrong, defendant Michael told her that the deceased threatened him and that he

hit her in the face. He further informed her that she could not see her because defendant Homer was in the basement talking to her. Thereafter Mary Ellen returned to her room and fell asleep.

The next morning, at approximately 7 a.m., Mary Ellen was awakened by the sound of her brother, defendant Michael Hanrahan, leaving for school. A short time later, defendant Homer Hanrahan came into her room to tell her to get ready for school. When Mary Ellen asked to see the deceased, defendant assured her that everything was all right and that her mother was still sleeping. Mary Ellen then left for school and when she returned, at approximately 2:15 p.m., she found a note from her father, stating that he and the deceased went on a trip and would return in a few days. Because it was unlike the deceased to leave without saying goodbye and because it was unusual for defendant Homer to spend the night at the house, Mary Ellen went to the police station later that night and related the above facts.

Following this conversation, the police officers accompanied Mary Ellen to her home. In the basement they discovered blood and observed that the floor had been freshly mopped. They also found a blood stained mattress pad on Marian Hanrahan's bed and noticed that the sheets and covers were missing. Mary Ellen checked her mother's closet and found that none of her clothes were missing.

Later that day, police officers went to the fraternity house where defendant Michael Hanrahan was living. They arrested him for battery to his mother and read him his *Miranda* rights. He was then taken to the Niles Police Station.

At the station, defendant Michael made several statements, after first having been read his rights on each occasion. One of the statements, which was introduced as evidence during trial and is part of this appeal, was given to officer Giovannelli. The substance of the statement was that on November 20, 1974, defendant Michael heard his father and the deceased arguing in the basement. When he heard a loud crash, he ran downstairs and saw his father, defendant Homer Hanrahan, standing over the deceased with blood on him and saying "Oh my God, what have I done?" Defendant Michael stated further that at approximately 11:30 a.m. the next day, he helped his father place the deceased in the trunk of the car and that he heard her moan.

Before officer Giovannelli was allowed to testify concerning this statement, the State objected on the ground that the statement only incriminated defendant Homer Hanrahan. However, defendant Homer stated that he did not object to the statement as long as the jury was instructed not to consider it against him. Accordingly, the court overruled the State's objection and admonished the jury to consider the statement only against defendant Michael.

Sometime during the evening of November 22, 1974, the day defendant Michael was arrested, police officers went to the home of Roberta Stiles. Miss Stiles was purportedly the girlfriend of defendant Homer Hanrahan. The officers knocked on the door and were admitted by Miss Stiles. Once inside, the officers observed defendant Homer's brown Chevrolet parked in the garage. The officer telephoned assistant State's Attorney Pappas, who advised the officers to open the trunk to determine whether the victim was still inside. The trunk was opened and the victim was found inside, dead.

Once arrested, defendant Homer was taken to the Niles Police Station where he was questioned by Mr. Pappas. He was also questioned by assistant State's Attorney Gino DiVito, who had previously questioned defendant Michael. During the questioning sessions, defendant Homer gave a statement, just as Michael had earlier.

During the trial, there was a discussion concerning the method of introducing the statements of the defendants. The trial court subsequently ruled that the statements could be admitted without excising references to the other co-defendant. The jury was then admonished that the statements could only be used against the declarant.

Mr. DiVito testified that defendant Michael Hanrahan related the following detailed account. On November 20, 1974, at 7:45 p.m., he and his father met at a restaurant. The purpose of the meeting was to discuss plans for holding the deceased captive until she agreed to sign title to the house in Niles over to the children. He stated that when they left the restaurant defendant Homer gave him a loaded, automatic pistol. Defendant Homer then went to purchase beer, while defendant Michael went home, arriving there the same time as the deceased. They entered together and a short time later, defendant Homer arrived. All three of them then went into the basement where defendant Michael produced a gun and demanded that the deceased sign the house over to the children. During this time defendant Homer was attempting to blindfold the deceased. She struggled and in the process kicked defendant Michael in the groin. In response, defendant Michael hit her on the head with the gun, causing her to fall to the floor unconscious. The deceased bled profusely and the defendants used towels to clean up the blood. When the deceased occasionally regained consciousness, defendant Homer would administer chloroform.

Defendant Michael told Mr. DiVito that a slit was then cut into the deceased's slacks, through which defendant Homer injected drugs directly into her buttocks and anus. Previously, defendant Homer had bound the deceased's hands and feet. When Mary Ellen and Steve came home, they were sent directly to bed. Because both defendants were splattered with blood, they removed their outer clothing and washed them in the washing machine. Defendants later carried the deceased up to her bedroom and defendant Michael went to sleep.

The next time defendant Michael saw the deceased was at 6:30 a.m. the next day. She was in bed, with a bandage wrapped around her head. Defendant Homer assured him that everything was all right, so he left for school. When he returned from school at approximately 10:30 a.m., he helped defendant Homer carry the deceased from the bedroom. She was wrapped in the sheets and blankets from the bed and placed into the trunk of the car. It was at this point that defendant Michael believed he heard the deceased groan. He noticed that the deceased was naked and that her arms and legs were still tied. Before leaving the house, defendant Homer wrote a note to Mary Ellen and Steve, explaining that their mother and he were going on a vacation.

Mr. DiVito also testified concerning a post-arrest statement given by defendant Homer Hanrahan in the presence of Mr. Pappas and Mr. DiVito. Mr. DiVito testified that defendant Homer stated "Blame it all on me. I did it, my son was not involved." He then went on to give the location of the gun, blankets, towels, bandages, and the deceased's clothing. Defendant Homer identified the drug used as Sparine and admitted injecting it into the defendant's buttocks. Defendant Homer stated that he was

familiar with drugs because of his previous employment as a drug salesman. He further stated that defendant Michael hit the deceased in the head with the gun after she produced a knife. At this point, Mr. DiVito testified, defendant Homer requested an attorney and the interview then ceased.

At this point in the trial, the jury was again admonished that the statements of each defendant could only be considered against the declarant and not against the other co-defendant.

At the opening of the defendants' case, defendant Homer Hanrahan testified in his own behalf. He testified that on November 20, 1974, he met defendant Michael at a restaurant at 7:45 p.m., prior to a prearranged meeting with the deceased. The purpose of the meeting with the deceased was to work out a property settlement in their pending divorce. He stated that he wanted to get the deceased away from the influence of her parents while working out the settlement.

On his way to the deceased's house, he stopped at a liquor store to cash a check and purchase beer. He stated that when he arrived at the deceased's house, he noted that her eyes and walk appeared "funny". The deceased was an epileptic and occasionally had seizures. The seizures were never severe, but on occasion, defendant Homer had to inject her with Sparine in order to calm her.

Defendant Homer and the deceased proceeded to the basement where they began sorting certain bills that he had paid and believed should be credited towards his child support payments. He testified that during this time the deceased began yelling and screaming incoherently and then collapsed to the floor. When he tried to pick her up, she produced a knife. A struggle ensued, during which

two tables were overturned and he received a cut on his hand. At this point defendant Michael entered the basement and attempted to separate them. The deceased kicked Michael and then bumped her head on a post, causing her to fall to the floor bleeding and semiconscious. Defendant Homer then went into the kitchen to find towels so that he could clean up the blood.

When defendant Homer went back to the basement, defendant Michael suggested that they call a doctor. Defendant Homer refused, however, because he believed that the deceased would blame him for her injuries and that he would be arrested.

Mary Ellen had since arrived home and been sent to bed. Because defendant Homer did not want her to hear the deceased moaning, he injected the deceased with Sparine. In order to do this, he cut a slit in her slacks and attempted to administer a tablet rectally. When several attempts failed, he injected a quantity of the drug directly into her anus and buttocks. At this time the deceased was moaning and said "It hurts." Thereafter, both defendants washed their clothes and cleaned the basement.

At approximately 10:15 p.m., Jerry Wallenberg, defendant Homer's brother-in-law, telephoned to say that he was bringing Steve Hanrahan home. Fearful of being discovered, defendant Homer covered the deceased's mouth with tape and gave her another injection of Sparine.

After Steve was sent to bed, the defendants carried the deceased to her bedroom. Defendant Michael again suggested that a doctor be called, but defendant Homer refused, assuring Michael she would be fine after she "slept it off". Defendant Homer then undressed the deceased and pulled covers over her.

The next morning, after all of the children, including defendant Michael had left for school, defendant Homer attempted to awaken the deceased. When she would not awaken, he realized that she was dead. Panicking, he attempted to lift her from the bed, but could not do so because she was too heavy and her arms and legs were too cumbersome. In order to facilitate her eventual removal from the room, he bound her arms and legs.

When defendant Michael unexpectedly returned home at 10:30 a.m., defendant Homer informed him that his mother was dead. The two defendants then placed the body in the trunk of the car and defendant Homer drove to the home of Roberta Stiles where he was later arrested. Defendant Michael went to a job interview.

At the conclusion of the trial, the jury found defendant Homer Hanrahan guilty of murder, aggravated battery, aggravated kidnapping, and conspiracy. He was sentenced to serve concurrent sentences of 50 to 100 years for murder, 20 to 40 years for aggravated kidnapping, and 3 to 10 years for aggravated battery. Defendant Michael Hanrahan was found guilty of aggravated kidnapping, aggravated battery, and conspiracy. He was sentenced to serve concurrent sentences of 10 to 25 years for aggravated kidnapping and 3 to 10 years for aggravated battery. Defendants appeal.

On appeal, defendants first argue that the trial court erred in denying their motion to quash the arrests and in denying their motion to suppress the evidence and statements obtained therefrom. They argue that the arrest of defendant Michael Hanrahan was not based upon probable cause and therefore, that all of the statements and evidence recovered following that arrest should have been suppressed.

We disagree. In Illinois, a police officer may arrest a person when he has reasonable grounds to believe that the person is committing or has committed an offense. (Ill. Rev. Stat. 1977, ch. 38, par. 107-2(c).) Further, the test for reasonableness of the officer's belief is whether a reasonable and prudent man in the officer's position and in possession of his knowledge would believe that the person arrested committed the offense. (*People v. Garza* (1976), 44 Ill.App.3d 30, 357 N.E.2d 1264.) Under the facts of the present case, the police officers had reasonable grounds to believe that defendant Michael Hanrahan was guilty of battery to his mother.

Mary Ellen Hanrahan told police officers that on the night of November 20, 1974, she heard an argument between the deceased and the defendants. She also observed blood on the defendants and heard her mother moan, "It hurts, it hurts." She stated that she was refused access to the deceased and was told by defendant Michael that he had hit her in the face. The next day, the deceased was gone and so were her bed sheets and covers. When police arrived at the Hanrahan home, they discovered blood in the basement and also on the mattress cover of the deceased's bed. Consequently, we believe these facts established reasonable grounds to cause a reasonable and prudent man to believe that defendant Michael Hanrahan had committed battery to his mother. His arrest was therefore lawful.

Defendant Homer Hanrahan argues that the trial court should have granted his motion for severance, based upon the incriminating statements given by defendant Michael. In support of his contention that his motion to sever should have been granted, he cites *Bruton v. U.S.* (1968), 391 U.S. 123.

The present case is not analogous to the facts in *Bruton*. In *Bruton*, two defendants were tried jointly and the confession of one defendant, in which he implicated his co-defendant who had not confessed, was admitted. Neither defendant testified at trial. Consequently, the Supreme Court held that the co-defendant who had not confessed was denied the right to confront his accuser. Here, however, both defendants made statements to the police that were later introduced at trial. While defendant Michael's statement was more detailed than defendant Homer's, both statements were substantially similar. In fact, in the course of a conversation with Mr. DiVito and after having been given his rights, defendant Homer said "Blame it all on me. I did it, my son was not involved." Further, during the trial defendant Homer even consented to the introduction of defendant Michael's statement into evidence, as long as the jury was properly instructed, which they were, on several occasions.

Finally, in *People v. Rosochacki* (1969), 41 Ill.2d 483, 244 N.E.2d 136, a case very similar to the one at present, the court stated:

"It is clear to us that a very substantial difference exists between a case in which a jury hears a co-defendant's statement incriminating a defendant who has himself made similar inculpatory admissions, and the *Bruton*-type case in which the co-defendant's statement is used against a defendant who has made no admissions. In the former case the prejudice to the defendant, if any, is minimal, and entirely insufficient to necessitate retrial, particularly where, as here, defendant's guilt seems clear." (41 Ill.2d at 494, 244 N.E.2d 142.)

We believe the rationale of *Rosochacki* is controlling here and therefore conclude that the trial court correctly denied defendant Homer Hanrahan's motion for severance.

Defendant Homer Hanrahan next argues that the trial court erroneously refused his instruction on involuntary manslaughter. He believes that an instruction on involuntary manslaughter was proper since the jury could have concluded that his conduct was merely reckless.

We disagree. In order to support a murder conviction, it is not necessary for the State to prove that the defendant intended to kill the victim, but only that he voluntarily and wilfully committed an act which had the natural tendency to cause death or great bodily harm. (*People v. Mitchell* (1973), 12 Ill.App. 3d 960, 299 N.E.2d 472.) Similarly, in *People v. Cannon* (1971), 49 Ill.2d 162, 273 N.E.2d 829, the court held where the defendant intentionally pointed and fired a gun into a crowd of people, though not intending to kill anyone, the trial court did not err in refusing an instruction on involuntary manslaughter.

In the case at bar, defendant Homer admitted that he voluntarily and wilfully injected drugs into the deceased, taped her mouth shut, and refused to call a doctor. Under the rationale of *Mitchell* and *Cannon* it is clear that his conduct cannot be construed as reckless since he acted of his own volition and his acts had the natural tendency to cause death or great bodily harm.

Defendants next argue that the jury's verdict finding defendant Michael Hanrahan guilty of aggravated kidnapping, but not guilty of murder was legally inconsistent. They argue that such an outcome cannot stand where the felony-murder doctrine is applicable.

We disagree. In *People v. Murray* (1975), 34 Ill.App. 3d 521, 340 N.E.2d 186, we held that neither legal nor logical consistency of verdicts is now required. In that case the defendant walked into a crowded bar and began firing a gun at patrons. One person was killed and several

others were wounded. Defendant was found guilty of murder but not guilty of aggravated battery. Addressing the issue of the legal consistency of the verdicts and relying on *People v. Dawson* (1975), 60 Ill.2d 278, 326 N.E.2d 755, we stated:

"We emphasize that our Supreme Court said that even considering the case as though it involved only the matter of a verdict of not guilty of felony-murder under the accountability statute and a verdict of guilty of the same forcible felony involved, it did not agree with the appellate court majority's reasoning because it thought that the appropriate consideration was that the jury may have acquitted Dawson of felony-murder because the jury believed that it's conviction of Dawson for the armed robbery provided sufficient punishment for what Dawson had done, and that that consideration forbids allowing the acquittal to upset or even to affect the simultaneous conviction. The jury's historic power of lenity must prevail, not only over the risk of an occasional compromise conviction of the lesser crime, but also over the traditional doctrine concerning legally and logically inconsistent verdicts. (34 Ill.App.3d at 536, 340 N.E.2d at 197.)

It is clear, therefore, that Illinois no longer requires that verdicts be legally consistent. See also *People v. Parks* (1977), 49 Ill.App.3d 65, 363 N.E.2d 93. Accordingly, defendant Michael Hanrahan's conviction for aggravated kidnapping must stand.

Finally, defendants argue that it was error for the trial court to allow assistant State's Attorney Pappas to act as the prosecutor in the case since he participated in its investigation. The defendants argue that the mention of Mr. Pappas' name during the course of the trial prejudiced their case.

While there is little case law on the issue, we believe that the trial court properly ruled that Mr. Pappas could act as the prosecutor in this case. His role during the investigation of this case was relatively minor. Almost all of the investigatory work, particularly the questioning of the defendants and witnesses, was handled by other assistant State's attorneys or police officers. Although Mr. Pappas testified at the motion to suppress hearing, he never testified at trial. Only once during opening statements did he mention his involvement in the case, for which he was quickly admonished by the court. Consequently, we fail to see how the defendants were in any way prejudiced by Mr. Pappas acting as prosecutor in this case. See *People v. Bissonnette* (1974), 20 Ill.App.3d 970, 313 N.E.2d 646.

For the foregoing reasons, the judgments of the circuit court of Cook County are affirmed.

JUDGMENTS AFFIRMED.

O'CONNOR and BUCKLEY, JJ., Concur.